Supreme Court, U.S.
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No. 10-257

IN THE
Supreme Court of the United States

NORTH COUNTY COMMUNICATIONS CORP.,
Petitioner,

v.

CELLCO PARTNERSHIP,
D/B/A/VERIZON WIRELESS-CA (OCN 6006), ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION FOR T-MOBILE USA, INC., CINGULAR WIRELESS, AND CRICKET COMMUNICATIONS, INC.

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October 25, 2010

PARTIES TO THE PROCEEDING

In addition to the parties named by the Petitioner, there were also a number of parties named as defendants in the lower court proceeding that did not appear or participate in the Ninth Circuit case:

California Catalog & Technology, d/b/a CTT Telecomms (OCN 573B), TGEC Communications Co. LLC, CA (OCN 5969); United States Cellular Corp - California, (OCN 6261); GTE Mobilnet of Tampa, Inc., (OCN 6339); Arch Wireless Holdings, Inc., (OCN 6630); El Dorado Cellular, d/b/a Mountain Cellular (OCN 6980); Brooks Fiber Properties, Inc., (OCN 7219); The Other Phone Company, Inc., (OCN 7452); Charter Fiberlink CA-CCO, LC, (OCN 776C); Firstworld So. CA, (OCN 7839); A+ Wireless Inc., d/b/a Advantage Wireless - CA (OCN 822A); Mpower Communications Corp - CA, (OCN 8322); Choice Telecomm, LLC - CA; Trans National Communications Intl, Inc. - CA (OCN 864C); Commpartners, LLC - CA (OCN 869C); Allegiance Telecom, Inc. - CA (OCN 8782; Onestar Communications, LLC - MD (OCN 9992); Integrated Communications Consultants, Inc. - CA (OCN 9397); NTCH - California, Inc. (OCN 9607); Telemex International - CA (OCN 998B); Bay Area Cellular Telephone; Pacific Centrex Services, Inc. - CA (OCN 3662); Bullseye Telecom, Inc. - CA (OCN 069A); Comm South Companies, Inc. - CA (OCN 400A); Arrival Communications, Inc. - CA (4553); BLUE Casa Communications LLC - CA (OCN 111B); Comcast Phone of California LLC - CA (OCN 7610); Communications Express, Inc., d/b/a Com Express; ECI Comms Inc., d/b/a ITS Network Services - CA

(OCN 3630); ER Nest Communications, Inc. - CA (OCN 4961); Excel Telecommunications, Inc. - CA (OCN 243A); Express Telephone Services, Inc. - CA (OCN 093A); Global Naps California, Inc. - CA (OCN 5300); In Touch Communications, Inc. - CA (OCN 047B); Lightyear Network Solutions, LLC - CA (OCN 5370); McGraw Communications, Inc. (OCN 5597); Metropolitan Telecomms California, d/b/a Mettel - CA (OCN 180A); PNG Telecomms d/b/a Powernet Global Comms CA (OCN 240B); Point Communications Corp - CA (OCN 2595); Preferred Carrier Services, Inc., d/b/a Phones For All (OCN 5428); Telephone Service Incorporated, d/b/a Friendlylec CA (OCN 2015); VCOM Solutions, Inc. - CA (OCN 334B); Wholesale Air-Time, Inc. - CA (OCN 199B); Blue Licenses Holding, LLC, (OCN 6010); Cal-One Cellular LP, (OCN 6604); Pacific Bell Mobile Services (OCN 6672)

CORPORATE DISCLOSURE STATEMENT

T-Mobile USA, Inc.: T-Mobile USA, Inc., a Delaware corporation, is a wholly-owned subsidiary of T-Mobile Global Holding GmbH, a German entity which, in turn, is a wholly-owned subsidiary of T-Mobile International AG, a German entity. T-Mobile International AG is a wholly-owned subsidiary of Deutsche Telekom AG, a German entity. Deutsche Telekom AG is a publicly-traded company. The American Depository Receipts of Deutsche Telekom AG are publicly traded in the United States. No other company owns 10% or more of T-Mobile USA, Inc.

Cingular Wireless: Cingular Wireless is owned by the following entities: (1) SBC Long Distance, LLC; (2) SBC Alloy Holdings, Inc.; (3) AT&T Mobility Corporation; (4) New Bell South Cingular Holdings, Inc; and (5) Bell South Mobile Data, Inc. None of these entities are publicly held or traded, however the ultimate corporate parent of all five entities is AT&T Inc., which is a publicly traded company, and there is no one person or group that owns 10% or more of the stock of AT&T Inc. In addition, Cingular Wireless LLC changed its names to AT&T Mobility LLC on January 8, 2007.

Cricket Communications, Inc.: Cricket Communications, Inc. is a wholly owned subsidiary of Leap Wireless International, Inc. Leap Wireless International, Inc. ("Leap") has issued stock that is publicly traded. Other than as indicated above, no publicly traded corporation owns more than 10% of the stock of Cricket Communications, Inc. ("Cricket"). To further enable the Court to evaluate possible conflict issues, Cricket states that, based solely on beneficial ownership information that has been filed with the Securities and Exchange Commission on Schedules 13D and 13G by beneficial owners of more than 5% of Leap common stock prior to the date hereof, Cricket believes that the following three entities have voting and investment power with respect to more than 10% of the total Leap stock outstanding: (i) entities affiliated with MHR Fund Management, LLC; (ii) entities affiliated with Harbinger Capital Partners Master Fund I, Ltd.; and (iii) T. Rowe Price Associates, Inc. Under the Federal Rules, Cricket is not required to and by this filing does not agree to undertake to supplement its

voluntary disclosure of beneficial owners of more than 10% of Leap common stock that are not publicly held by a corporation.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

CORPORATE DISCLOSURE STATEMENT ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 9

I. THE NINTH CIRCUIT PROPERLY REJECTED PETITIONER'S REQUEST TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION IN FEDERAL COURT FOR VIOLATIONS OF RULE 20.11 10

A. Petitioner Misrepresents the Scope of *Global Crossing* 11

B. The Ninth Circuit Opinion is Consistent with *Global Crossing* and Does Not Conflict with Other Circuits 14

C. The Petitioner Wrongly Asserts That the FCC Has Made the Necessary Finding to Support a Private Right of Action for its Claims 16

II. The Case Does not Present an Issue of Significant import 19

III. Petitioner's Taking Question Was Not Raised Or Decided Below and Is Not Ripe For Review 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Ace Telephone v. *Koppendrayer*,
432 F.3d 876 (8th Cir. 2006) 15

Conboy v. AT&T Corp.,
241 F.3d 242 (2d Cir. 2001) 16

Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,
550 U.S. 45 (2007) ..... passim

Greene v. Sprint Communications Co.,
340 F.3d 1047 (9th Cir. 2003) 16

MetroPCS v. FCC,
No.10-1003 (D.C. Cir. filed Jan. 8, 2010) 9

Touche Ross & Co. v. Redington,
442 U.S. 560 (1979) 16

Williamson County Regional Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 24

Youakim v. Miller,
425 U. S. 231 (1976) 24

ADMINISTRATIVE DECISIONS

Developing a Unified InterCarrier Compensation Regime, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610 (2001) 21

Implementation of Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 (1996) 6, 14

Implementation of Sections 3(n) and 332 of the Communications Act, 9 F.C.C.R. 1411 (1994) 5

North County Communications Corp. v. MetroPCS California, LLC, Order on Review, 24 F.C.C.R. 14036 (2009). ..... passim

North County Communications Corp. v. MetroPCS California, LLC, Memorandum Opinion and Order, 24 F.C.C.R. 3807 (2009) 8, 21

Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order 18 F.C.C.R. 19975(2003) 13

T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order, 20 F.C.C.R. 4855 (2005) ..... passim

FEDERAL STATUTES

47 U.S.C. § 206 12

47 U.S.C. § 207 ..... 11, 16

47 U.S.C. § 251(a)(1) 6

47 U.S.C. § 251(b)(5) 14

47 U.S.C. § 252(d)(2)(B)(i) 15, 16, 21

47 U.S.C. § 332(d)(1) 4

Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) 5

REGULATIONS

47 C.F.R. § 20.11(b) ("Rule 20.11") 1, 6

47 C.F.R. § § 64.1300(b), (d) 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V 24

INTRODUCTION

The instant Petition involves a dispute about whether Petitioner, a wireline telephone company (or "local exchange carrier"), is owed payments from Respondents, who are wireless carriers, because Petitioner has "terminated" telephone calls made by Respondents' customers to chat-lines and telemarketers served by Petitioner. The Petitioner's legal theory to support recovery is based on its allegation that Respondents violated 47 C.F.R. § 20.11(b) ("Rule 20.11") of the Federal Communications Commission ("FCC") rules and § 201(b) of the Communications Act of 1934 ("Communications Act"), which prohibits "unjust or unreasonable" practices. 47 U.S.C. § 201(b). Petitioner thus far, however, has failed to assert a legal theory under federal law that requires Respondents to pay compensation where there is no contractual obligation to make the requested payments.

More precisely, the central question presented by this Petition for a Writ of *Certiorari* ("Petition") is whether a private right of action for a violation of § 201(b) exists on the grounds that FCC Rule 20.11 has been violated, when § 201(b) does not expressly prohibit the alleged conduct and where the FCC has not found that a wireless carrier's failure to pay compensation in the absence of an agreement violates Rule 20.11 and § 201(b). Both the Southern District Court of California and the Ninth Circuit properly answered this question in the negative. *See* Pet. App. 1a and Pet. App. 30a. The Ninth Circuit

held that the district court "properly dismissed [Petitioner's] declaratory judgment claims, as [Petitioner] cannot demonstrate a right to compensation under any statute or regulation that is enforceable pursuant to a federal private right of action." Pet. App. 1a. In support, the Ninth Circuit noted that its opinion was "bolstered by the Supreme Court's recent decision in *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.*, 550 U.S. 45 (2007)." Pet. App. 20a.

> [T]he Supreme Court limited its [*Global Crossing*] holding, as it did "not suggest that the FCC is required to find carriers' failures to divide revenues to be § 201(b) violations in every instance." *Id.* at 56. (citation omitted). "Nor [did it] suggest that every violation of FCC regulations is an unjust and unreasonable practice. . . . In contrast to the facts in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate [competitive local exchange carriers] constitutes an unreasonable practice in violation of § 201(b). Because North County cannot demonstrate a violation of § 201(b) in the absence of an FCC determination, the district court properly dismissed North County's claims.

Pet. App. 22a-23a (citation omitted).

Petitioner now seeks review of the Ninth Circuit opinion, asserting that the appellate court improperly applied this Court's holding in *Global Crossing*. As discussed below, the Court found in *Global Crossing* that a private right of action existed

for a violation of a FCC rule where the FCC had explicitly determined that failing to comply with its rule violated § 201(b) of the Act. In this case, however, the Ninth Circuit correctly found that "the [FCC] has not determined that the CMRS providers' lack of payment to [competitive local exchange carriers] like North County violates § 201(b)." Pet. App. 19a. The Ninth Circuit opinion is thus consistent with this Court's precedent and does not present an important federal question that this Court must address.

STATEMENT OF THE CASE

Petitioner is a competitive telephone company, known as a competitive local exchange carrier ("CLEC") as opposed to an incumbent local exchange carrier ("ILEC"), which serves customers such as Internet Service Providers ("ISPs"), voice-mail companies, conference-lines, and 976 chat-line providers. Pet. at 2; *see also North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, 24 F.C.C.R. 14036, 14037, ¶¶ 3-5 (2009). ("MetroPCS Order"). As a result, Petitioner mostly receives incoming calls to its network and these chat-line providers and conference-lines generally do not place out-bound calls to customers of other carriers. Respondents are wireless carriers, called commercial mobile radio service ("CMRS") providers. *See* 47 U.S.C. § 332(d)(1).

Petitioner claims that Respondents have refused to enter into agreements to pay Petitioner for receiving and "terminating" (delivering) telephone calls ("traffic") from Respondents' customers to Petitioner's end-users. Pet. at 3. Petitioner further

claims that Respondents' failure to pay Petitioner for terminating calls that Respondents' customers have made to Petitioner's customers violates federal law. Pet. at 3.[1]

The Act and the FCC's Rules

Congress created the regulatory classification of CMRS provider in the Omnibus Reconciliation Act of 1993.[2] The FCC, in implementing the Act, issued rules governing interconnection obligations that it had imposed in the mid-1980s on ILECs relative to cellular carriers and further extended those LEC obligations to all wireless carriers. *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 F.C.C.R. 1411, 1497-98, ¶¶ 227-232 (1994). Rule 20.11(b) provides:

> (b) Local exchange carriers [LECs] and commercial mobile radio service providers "shall comply with principles of mutual compensation.

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[1] Petitioner makes a number of factual assertions in its Statement of the Case that Respondents do not agree with, including the following: (1) that Respondents have refused to enter into negotiations for a compensation agreement; (2) that all of the Respondents have received bills from Petitioner; (3) that Petitioner actually "terminates" these calls; (4) that Petitioner incurs costs for such termination; and (5) that Petitioner's billed rates are "even lower than those of some ILECs whose bills the CMRS providers do pay." *See* Pet. at 3-6. However, because this case was dismissed in response to a motion to dismiss the complaint, the assertions in the Petitioner's complaint were taken at face value by the courts below.

[2] Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993).

> (1) a [LEC] shall pay reasonable compensation to a [CMRS] provider in connection with terminating traffic that originates on facilities of the [LEC].
>
> (2) a [CMRS] provider shall pay reasonable compensation to a [LEC] in connection with terminating traffic that originates on the facilities of the [CMRS] provider.

47 C.F.R. § 20.11(b) (1994).

Two years following the adoption of Rule 20.11, Congress enacted the Telecommunications Act of 1996. In this statute, Congress required "each telecommunications carrier" to interconnect with other telecommunications carriers so that traffic may be exchanged between networks. *See* 47 U.S.C. § 251(a)(1). Congress further imposed on "each local exchange carrier" the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." *Id.* at § 251(b)(5).

Congress further clarified that reciprocal compensation obligations applied only to LECs (wireline carriers) and not to CMRS providers. *See id.* at § 153(26) (CMRS providers are not LECs unless the FCC classifies them as LECs); *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, 15994, ¶¶ 1004-05 (1996) ("First Local Competition Order") ("We . . . decline at this time to treat CMRS providers as LECs. . . . Thus, until such time that we decide

otherwise, CMRS providers . . . are not subject to the obligations of section 251(b).")

A controversy arose nearly a decade later, because some LECs began billing CMRS providers for call termination without an agreement, pursuant to their State tariffs. The FCC found that "neither [its] reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the type of arrangements that trigger a compensation obligation." *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* Declaratory Ruling and Report and Order, 20 F.C.C.R. 4855, 4860-61 at ¶ 10 (2005) ("T-Mobile Declaratory Ruling"). The FCC determined that "[g]oing forward . . . we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff." *Id.* at 4860, ¶ 9. The FCC therefore added paragraph (d) to its Rule 20.11:

> (d) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs. 47 C.F.R. § 20.11(d) (2005).

The NCC v. MetroPCS FCC Complaint Proceeding

In 2006, Petitioner filed a complaint with the FCC against one CMRS provider (MetroPCS, Inc.), alleging that MetroPCS' refusal to compensate Petitioner for call termination violated federal law.

In dismissing this cause of action, the FCC's Enforcement Bureau specifically stated that: "We make no determination at this time as to whether [R]ule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under [R]ule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of compensation." *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 F.C.C.R. 3807, 3814 n.55, (2009) ("MetroPCS Bureau Order").[3] Instead, the Bureau determined that Petitioner "should first obtain from the California Public Utilities Commission ("CPUC") a determination of a reasonable compensation rate." *Id.* at 3807, ¶ 2. The full FCC affirmed the Bureau's order on all grounds, but instead of dismissing the Rule 20.11 claim, the FCC held it in abeyance so that Petitioner may reinstate its complaint at the FCC to determine whether MetroPCS failed to pay reasonable compensation pursuant to Rule 20.11 after the CPUC determined the "reasonable rate" for compensation. *MetroPCS Order*, 24 F.C.C.R. at 14044-45 ¶22. This FCC order is currently pending on appeal. *See MetroPCS v. FCC*, No.10-1003 (D.C. Cir. filed Jan. 8, 2010).

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[3] The Bureau denied the claim that MetroPCS' refusal to enter into an agreement to pay compensation constituted an "unjust and unreasonable practice under section 201(b)," finding that the parties' inability to reach an agreement stemmed from "irreconcilable but *honestly* held beliefs rgarding the compensation rate, which, in turn, stem from *good faith* disagreements." *Id.* at 3815-16, ¶¶ 19-20 (emphasis in original).

The Litigation Below

This Petition arises from a lawsuit that Petitioner filed in 2006 in the United States District Court for the Southern District of California against Respondents, who are wireless carriers other than MetroPCS. Petitioner sought, among other things, a declaration that Respondents owe it for the termination of calls on Petitioner's network, and that failure to pay Petitioner for such termination violated the "unjust or unreasonable" prohibition of § 201 and damaged Plaintiff pursuant to § § 206-207 of the Communications Act.

The district court dismissed Petitioner's third amended complaint with prejudice pursuant to Respondents' Motion to Dismiss, finding that there was no federal subject matter jurisdiction and that no private right of action existed for violations of Rule 20.11. Pet. App. 30a. The court specifically found that provisions of § § 206-207 do not provide an independent basis for a private right of action unless some other statute has been violated, and that § 201(b) does not provide an independent basis for a private right of action "on the premise regulatory violations necessarily give rise to claims thereunder." Pet. App. 43a. The district court further held that only in "narrow circumstances . . . will the violation of an FCC regulation support a private right of action for damages thereunder, such as when the FCC has expressly determined in its implementing order a particular rules violation constitutes a Section 201(b) violation enforceable through a private court action." Pet. App. 43a.

The Ninth Circuit unanimously affirmed the district court's judgment and endorsed its reasoning. Pet. App. 1a. However, rather than dismissing the Petitioner's suit with prejudice as the district court had, the Ninth Circuit remanded for the complaint to be dismissed *without* prejudice, given that the FCC has primary jurisdiction over these issues and is still considering the issues. In so ruling, the Ninth Circuit held that: "Given the Commission's consideration of [Peti tioner's] compensation claims in *MetroPCS* and the absence of a Commission determination regarding whether the CMRS providers' failure to compensate [Petitioner] violates § 201(b), we conclude that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." Pet. App. 28a. (citation omitted).

REASONS FOR DENYING THE WRIT

Petitioner does not allege any circuit conflict in this case and only seeks certiorari on two issues, neither of which satisfies any of this Court's certiorari criteria.

First, the Ninth Circuit properly rejected Petitioner's request to create an implied cause of action in federal court for violations of Rule 20.11. As the Ninth Circuit stated, "[i]n contrast to the [express cause of action this Court allowed] in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate CLECs constitutes an unreasonable practice in violation of § 201(b)." Pet. App. 23a. This straightforward application of *Global Crossing* is correct and does not conflict with any decision from any other court of

appeals. Nor does the Ninth Circuit's decision even have significant import, for the court expressly noted that the Petitioner could seek administrative relief for its alleged damages. Finally, even if the issue of whether a private right of action exists for violations of Rule 20.11 were worthy of certiorari, this would be a poor vehicle for addressing it because, as explained below, Respondents' actions did not even violate the Rule.

Second, Petitioner's takings claim was neither pressed nor passed on below. That alone makes certiorari inappropriate. Even setting that aside, no court has ever accepted the claim and it is not ripe in any event.

I. THE NINTH CIRCUIT PROPERLY REJECTED PETITIONER'S REQUEST TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION IN FEDERAL COURT FOR VIOLATIONS OF RULE 20.11

The Communications Act provides that a party may bring an action in federal court for "recovery of the damages for which such common carrier may be liable under the provisions of this Act." 47 U.S.C. § 207 (emphasis added). A common carrier (or a telephone company) is "liable" for "damages" related to the telephone company's doing "any act, matter, or thing in *this Act* prohibited or declared to be unlawful." 47 U.S.C. § 206 (emphasis added). Thus, in order to bring a claim in federal court, the complainant must allege a violation of the Communications Act.

Petitioner alleges that Respondents have violated FCC Rule 20.11, which it argues, in turn violates the prohibition against "unjust or unreasonable" practices in § 201(b) of the Communications Act ("all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful"). 47 U.S.C. § 201(b).

As this Court has held, an FCC rule by itself does not create a private cause of action. *Global Crossing*, 550 U.S. at 56 ("Nor do we suggest that every violation of FCC regulations is an unjust and unreasonable practice."). Rather, only those regulations that the FCC properly determines implement § 201(b) give rise to private causes of action. *Global Crossing*, 550 U.S. at 55. The Ninth Circuit correctly concluded that FCC Rule 20.11 is not such a rule.

A. Petitioner Misrepresents the Scope of *Global Crossing*

Petitioner selectively quotes from the *Global Crossing* opinion as finding that a § 201(b) claim exists "[if] the FCC *could* properly find that a [carrier's] failure to pay compensation [pursuant to an FCC rule] is an 'unjust or unreasonable' practice [deemed unlawful] under § 201(b)." Pet. at 11. Petitioner misrepresents the focus of the Court's inquiry, which was on whether an *actual* FCC finding itself was proper to establish a private right of action.

In *Global Crossing*, a payphone operator filed suit alleging a § 201 claim against a long-distance carrier based on the carrier's refusal to pay the payphone operator and contending that the refusal was "unreasonable" and violated the Communications Act. In that case, the FCC issued a series of payphone rules pursuant to a specific statutory provision (Section 276 of the Communications Act), which required, among other things, that a carrier that completes a call from a switch owned by the carrier shall "compensate the payphone service provider for that call at a rate agreed upon by the parties by contract," and "[i]n the absence of an agreement . . . the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494" per minute." 47 C.F.R. § § 64.1300(b), (d). The FCC also expressly found that "failure to pay in accordance with the Commission's payphone rules" constitutes "an unjust and unreasonable practice in violation of section 201(b) of the Act." *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order 18 F.C.C.R. 19975, 19990 at ¶ 32 (2003) (footnote omitted). This Court determined that, in light of the FCC's authority to interpret the Communications Act and because the FCC payphone rules were issued to implement an "explicit statutory scheme," it was well within the FCC's authority to determine that failure to comply with the payphone rules was "unreasonable" under § 201. *Global Crossing*, 550 U.S. at 58.

The facts here are very different from *Global Crossing*. First, unlike in *Global Crossing*, there is

no "explicit statutory scheme" here; to the contrary, while Congress imposed a reciprocal compensation obligation on LECs like Petitioner, it deliberately imposed no such obligation on CMRS providers. *See* 47 U.S.C. § 251(b)(5).

Second, unlike in *Global Crossing*, the FCC has never determined that a wireless carrier's failure to pay reciprocal compensation to a LEC in the absence of an agreement contravenes § 201(b) of the Act; indeed, it has never even declared that the alleged conduct violates the rule at issue, Rule 20.11.

Third, unlike in *Global Crossing*, the FCC did not prescribe a specific rate for call termination by competitive LECs like Petitioner; to the contrary,[4] Congress has explicitly recognized that a bill-and-keep arrangement of the kind that Petitioner and Respondents have been using is one means for LECs to satisfy their statutory reciprocal compensation duty. *See* 47 U.S.C. § 252(d)(2)(B)(i).

Moreover, the dismissal of Petitioner's federal court complaint does not leave Petitioner without a

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[4] The FCC, in implementing § 251(b)(5), has held that a LEC like Petitioner may recover in intercarrier compensation only its traffic sensitive end office switching costs incurred in terminating the originating carrier's traffic. *See First Local Competition Order*, at 16025 ¶ 1057 (1996). As courts have held, "if no additional costs are incurred, there is nothing to pay. The district court's reading of § 251(b)(5) would force carriers to pay one another regardless of whether they incurred additional costs or not. Such a reading would directly contradict the plain meaning of § 252(d)(2)(A)(ii)." *Ace Telephone* v. *Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2006). As stated, *supra*, n.1, Respondents dispute whether Petitioner incurs costs in "terminating" this traffic.

remedy. The Ninth Circuit specifically observed that Petitioner could pursue its claims at the FCC – as the Petitioner already has done with regard to MetroPCS.

In the end, Petitioner wrongly attempts to broaden *Global Crossing*'s holding to permit private enforcement of FCC regulations if the FCC "could" find that the alleged activity violates the Act. The *Global Crossing* opinion does not establish such a broad standard for finding private rights of action to enforce FCC regulations.

B. The Ninth Circuit Opinion is Consistent with *Global Crossing* and Does Not Conflict with Other Circuits

Petitioner also misrepresents the Ninth Circuit opinion below as interpreting *Global Crossing* too narrowly to require that the FCC conclude that "a *specific* CMRS provider's failure to pay a *specific* LEC for its termination of calls violates § 201(b) to support a private right of action under § 207." Pet. at 8. (emphasis added). The Ninth Circuit never required such a *specific* finding; it only concluded that, in the absence of clear intent that § 201(b) prohibits the practice Petitioner complains of, the court should look to whether the FCC had determined that the alleged activity violates the Communications Act.

As explained, the Ninth Circuit's review of whether the FCC had interpreted the Communications Act to prohibit the alleged activity is consistent with *Global Crossing*. Section 201(b) on

its face does not prohibit the failure to pay compensation in the absence of an agreement between carriers; to the contrary, the Act explicitly permits the use of a bill-and-keep arrangement of the sort that Petitioner and Respondents have been using. *See* 47 U.S.C. § 252(d)(2)(B)(i). In the absence of clear Congressional intent, courts have been reluctant to imply private rights of action. *See Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1052-53 (9th Cir. 2003) ("to imply a private right of action runs counter to this centralization of function [in the FCC] and to the development of a coherent national communications policy"); *Conboy v. AT&T Corp.*, 241 F.3d 242, 252-253 (2d Cir. 2001) ("it is highly unlikely, therefore, that Congress intended to create a private right of action for violations of FCC regulations.") In *Global Crossing*, it was only because the FCC had reasonably interpreted the Communications Act to prohibit the conduct at issue that this Court found a private right of action to enforce the regulation.

The Ninth Circuit properly declined to "fill in the analytical gap stemming from the absence of a Commission determination regarding § 201(b)." Pet. App. 20a. Specifically, the Ninth Circuit concluded that there was no basis to find a private right of action here, because, "[i]n contrast to the facts in *Global Crossing*, the [FCC] has not made any findings that CMRS providers' failure to compensate CLECs constitutes an unreasonable practice in violation of § 201(b)." Pet. App. 23a.

C. The Petitioner Wrongly Asserts That the FCC Has Made the Necessary Finding to Support a Private Right of Action for its Claims.

At the same time that it argues that *Global Crossing*'s scope allows implied findings by the FCC that the alleged activity violates § 201(b), Petitioner also claims that the FCC has indeed made the express finding necessary to establish a private right of action. To support this contention, Petitioner selects isolated statements out of context from FCC orders. The Ninth Circuit properly rejected these arguments. Read in context, the statements that Petitioner cites do not: (i) interpret § 201(b) to prohibit the activity complained of, or (ii) even determine that the alleged activity violates the applicable FCC rule (section 20.11). To the contrary, these issues have come before the FCC in a complaint case filed by the Petitioner with similar facts, and the FCC has declined to make the very findings on which Petitioner's claims are premised.

In support of its assertion that an actual FCC determination has been made, Petitioner first points to the FCC's statement in the *NCC v. MetroPCS* case that another wireless carrier's failure to pay Petitioner for terminating calls "could constitute a violation of § 201(b) of the Act." Pet. at 15. However, as the Ninth Circuit correctly ruled, the FCC did *not* make the determination that Petitioner seeks. Quoting from the FCC's order in *NCC v. MetroPCS*, the Ninth Circuit observed that "in *MetroPCS*, the [FCC] merely '[f]or purposes of [that]

Order only, . . . assumed, *without deciding*, that a CMRS carrier's failure to enter in good faith into an agreement with a CLEC regarding the termination of intrastate traffic, and a failure to pay a CLEC for such termination, could constitute a violation of section 201(b) of the Act.'" Pet. App. 19a and 20a, n.8 (emphasis added), *citing MetroPCS Bureau Order*, at 3817 n.72; *see also MetroPCS Order*, at 14039 ¶ 9 n.35. The Ninth Circuit concluded that the FCC "simply did not make the determination that [Petitioner] seeks." Pet. App. 19a-20a n.8.

Petitioner also asserts that the FCC has made an "actual determination" that it is owed compensation pursuant to Rule 20.11 in the *T-Mobile Declaratory Ruling*. Pet. at 15. More specifically, Petitioner alleges that the FCC found in the *T-Mobile Declaratory Ruling* that "for the period prior to April 29, 2005, tariffs were lawful and valid." Pet. at 15. (citation omitted). The Petitioner further argues that, because of that determination, the Respondents' failure to pay termination violates FCC Rule 20.11 and is an unreasonable practice under § 201. There are several deficiencies in Petitioner's arguments.

First, the FCC did not find in the *T-Mobile Declaratory Ruling* that a failure to pay tariffed termination charges violates its rules or the Act. The FCC did not deem those tariffs filed before April 29, 2005 lawful; it only declined to find them *unlawful*. The FCC expressly noted that, while "a tariffed arrangement would not be unlawful *per se* under current rules [as of April 29, 2005], we make no findings regarding *specific obligations* of any

customer of any carrier to *pay any tariffed charges*." *T-Mobile Declaratory Ruling*, at 4861 n.40. (emphasis added).

Second, the tariffs that the FCC declined to find unlawful were tariffs filed by *incumbent* local exchange carriers – and not those filed by competitive local exchange carriers, like Petitioner. *Id.* at 4863, ¶ 13 ("For all of these reasons, we cannot conclude that a tariff filed by an incumbent LEC imposing termination charges on wireless traffic would be unlawful").[5]

Third, the FCC only found that ILEC tariffs *filed before April 29, 2005* were not unlawful. The FCC ruled that, as of April 29, 2005, no state LEC tariff for termination charges may be unilaterally imposed on a wireless carrier; and that under its amended Rule 20.11, "in the absence of a request for an interconnection agreement, no compensation is owed for termination." *Id.* at 4864 n. 57.

Thus, the FCC has not made the necessary nexus between a Rule 20.11 violation and § 201(b) of the Act. In fact, as discussed above, the FCC has

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[5] Incumbent local exchange carriers have different rights and obligations with respect to interconnection and traffic compensation *vis a vis* CMRS providers than CLECs. *See, e.g.*, Rule 20.11(e) (an "incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act."). Section 252 of the Act requires ILECs to negotiate and arbitrate interconnection and reciprocal compensation agreements at a state commission; however, it does not empower state commissions to arbitrate interconnection agreement disputes between two competitive carriers (*e.g.*, a competitive LEC and CMRS provider).

recently declined to make the most fundamental finding on which Petitioner bases its claim – that a wireless carrier's failure to pay termination charges to Petitioner (in the absence of a negotiated agreement) even violates its Rule 20.11 in a suit brought by Petitioner against another CMRS provider. Given the FCC's failure to find even a violation of Rule 20.11 on the nearly the *same facts* as underlie Petitioner's claims here, it is particularly appropriate that the Ninth Circuit refused to imply a private right of action for compensation under § 201(b) and to remand for dismissal of the declaratory judgment claim (premised on § 201(b)) without prejudice "to allow filing of the claim in the proper forum." Pet. App. 28a.

II. THE CASE DOES NOT PRESENT AN ISSUE OF SIGNIFICANT IMPORT.

Petitioner next argues that the Petition presents an issue of "great practical importance." Pet. at 17. Asserting that "it would be antithetical to the pro-competition goals underlying the 1996 Communications Act to allow Respondents . . . to continue free-riding on CLECs such as [Petitioner]," (Pet. at 18), Petitioner argues that "[r]equiring [it] and other CLECs to return to the FCC for a second administrative determination . . . would do nothing." Pet. at 19. Petitioner overstates the importance of these issues and the alleged burden imposed by the Ninth Circuit's holding that Petitioner should seek relief first at the FCC.

As an initial matter, the Petitioner's claim rests on a faulty premise that Respondents' actions constitute "free-riding" on its network. Pet. at 19.

As discussed, the FCC has not determined that a CMRS provider necessarily has an obligation to pay termination to a carrier in the absence of a negotiated agreement. *MetroPCS Bureau Order* at 3814, ¶ 15, n.55; *MetroPCS Order*, at 14038, ¶ 8. To the contrary, the FCC has tentatively concluded that bill and keep (*i.e.*, exchange of traffic without payment) is particularly appropriate in cases where, such as here, traffic flows almost entirely in one direction. *See Developing a Unified InterCarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 F.C.C.R. 9610, 9616-9618, 9629 at ¶¶ 11-18, 52 (2001) ("Intercarrier Compensation NPRM"); *see also* 47 U.S.C. § 252(d)(2)(B)(i); Federal Communications Commission, *Connecting America: FCC National Broadband Plan* (rel. Mar. 16, 2010) ("National Broadband Plan"), Recommendation 8.7 at 148 (proposing to eliminate all payments for intercarrier compensation in favor of bill-and-keep).[6]

Moreover, the traffic compensation issues that are raised by this Petition are but a subset of a fairly complex set of issues surrounding intercarrier compensation that are currently pending before the FCC. In addition to the *MetroPCS* case, which has held in abeyance the issue underlying this case (*i.e.*, whether failure to pay terminating compensation to Petitioner in the absence of an agreement violates FCC Rule 20.11), the FCC has at least three pending proceedings in which it is addressing some or many aspects of the issues raised here. *See InterCarrier Compensation NPRM* (CC Docket No. 01-92); *T-Mobile Declaratory Ruling*, Petitions for Rehearing

[6] Available at: http://download.broadband.gov/plan/national-broadband-plan.pdf

(CC Docket No. 01-92); *Establishing Just and Reasonable Rates for Local Exchange Carriers* (WC Docket No. 07-135). Earlier this year, the FCC also affirmed its commitment to addressing traffic compensation issues, and emphasized that it would resolve some of the issues (including arbitrage of the compensation rules by carriers that engage in traffic "stimulation") by the end of this year. *FCC National Broadband Plan,* Recommendation 8.7 at 148. Accordingly, the FCC is and will be addressing the underlying issues in the near future and there is no pressing need for the Court to address the issues asserted in the Petition at this time.

Petitioner also exaggerates the burden that would be imposed on it by having to return to the FCC to obtain the preliminary liability finding. As an initial matter, Petitioner already has sought resolution at the FCC of similar issues in the *NCC v. MetroPCS* case; thus, its claim that this is unduly burdensome is disingenuous. Furthermore, Petitioner only sought a declaratory judgment from the court below that it is owed compensation pursuant to Rule 20.11 and § 201(b). Even if Petitioner obtained the declaratory judgment that it sought, it would still need to obtain an administrative finding as to the "reasonable" rate for termination. *See MetroPCS Order* at ¶ 20. As Petitioner acknowledges in its own Complaint, the rate at which it would be compensated would "be determined by the appropriate regulatory body." Third Amended Complaint at ¶ 30, *North County Communications Corp. v. A+ Wireless, Inc., dba Advantage Wireless-CA (OCN 822A) et al.*, Case No. 06-CV-1542 (filed Mar. 21, 2007). By Petitioner's

own admission, therefore, it would still need to return to an administrative agency to obtain a ruling as to the appropriate rate for compensation even if it were able to enforce its claim in court.

III. PETITIONER'S TAKING QUESTION WAS NOT RAISED OR DECIDED BELOW AND IS NOT RIPE FOR REVIEW

Petitioner asserts that the Court should grant certiorari because a physical taking has occurred by virtue of the Ninth Circuit's opinion, for which just compensation is owed. Pet. at 20. The Ninth Circuit's opinion, however, does not compel Petitioner, nor any other carrier, to "unwillingly accept traffic from another carrier," nor does it force the Petitioner to bear any public burden. Consequently, there has been no Fifth Amendment taking.

In any event, the issue was neither raised nor decided below, which Petitioner concedes. *See* Pet.. at 21. "'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim v. Miller*, 425 U. S. 231, 234 (1976) (per curiam) (quoting *Duignan v. United States*, 274 U. S. 195, 200 (1927)). While Petitioner would like this Court to believe this is such an exceptional case, it is not. In fact, the question is not even ripe for review.

This Court has consistently held that a takings claim challenging the application of an agency's regulations is not ripe for review unless "the government entity charged with implementing the regulations has reached a final decision regarding

the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). The Court in *Williamson* stated that to meet the ripeness requirement, a two-prong test must be met, showing that: (1) the regulatory entity has rendered a "final decision" on the matter, and (2) the plaintiff has sought just compensation by means of an available governmental procedure. *Id.* at 186, 194-95. Petitioner has not met either of these prongs.

The FCC has not rendered a final decision, with regard to the Respondents or any other CMRS carrier, as to whether Petitioner is entitled to compensation when there is no agreement between the parties. The *T-Mobile Declaratory Ruling* raised the question of what arrangements are necessary to trigger compensation obligations under the FCC's rules. Although that decision prohibited the application of tariffs to impose compensation obligations for "local" traffic after April 29, 2005, no subsequent decision by the FCC has answered the question as to whether compensation is owed absent an agreement between the parties. Furthermore, as to the Respondents, and in accordance with the Ninth Circuit opinion instructions, the Petitioner must obtain from the FCC a decision regarding whether any compensation is owed by the Respondents, before it can pursue its takings claim. Because there has been no final decision by the FCC, it is premature to discuss whether Petitioner has sought just compensation by means of an available governmental procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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